No. 5904

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

WILLIAM A. SHERMAN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE

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SUBJECT INDEX

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BRIEF AND ARGUMENT FOR APPELLEE

A

STATEMENT OF THE CASE

This is an appeal from the order of the United States District Court, denying a motion of appellant to withdraw, recall and quash an alias execution levied upon the individual property of appellant.

The action was brought by the United States of America as plaintiff against William A. Sherman, M. F. Cochrane and J. B. Sanford, constituting the Board of State Harbor Commissioners of the State of California, for alleged violations of the Federal Safety Appliance Act occurring in connection with the operation of the State Belt Railroad (Tr. p. 7).

The return of the United States Marshal shows that the complaint was served upon the Secretary of the Board of State Harbor Commissioners (Tr. p. 8).

A motion to dismiss (Tr. pp. 43-47) was filed by the attorney for the defendants named in the complaint. This motion was denied, no further pleading was filed by defendants, and on June 28, 1927, a default judgment was entered against William A. Sherman, M. F. Cochrane and J. B. Sanford, constituting the Board of State Harbor Commissioners, operating the State Belt Railroad (Tr. pp. 9-10).

An alias execution was issued on May 2, 1929, and on May 17, 1929, was levied on the individual property of defendant and appellant William A. Sherman (Tr. pp. 12-15).

Thereafter appellant filed, in the United States District Court, his motion to withdraw, quash and recall the alias execution (Tr. pp. 16-23) which said motion was on June 26, 1929, denied (Tr. p. 28).

This appeal is from the order denying the motion to withdraw, quash and recall the said alias writ of execution.

The appeal presents three questions for consideration:

1. Is the order appealed from an appealable order?

2. Was the default judgment upon which execution issued a valid judgment against defendant and appellant William A. Sherman?

3. Was the judgment against defendants in their individual capacities, and was the execution properly

levied on individual property of appellant William A. Sherman?

B

ARGUMENT

I. THIS COURT HAS NO APPELLATE JURISDICTION OF THIS APPEAL AND FOR THIS REASON THE APPEAL SHOULD BE DISMISSED.

The final judgment in this case was given on June 28, 1927; thereafter and on May 2, 1929, an alias execution was duly issued, and on May 27, 1929, was levied upon certain property of defendant and appellant William A. Sherman. Subsequently, on June 10th, appellant came into court with a motion to withdraw, recall and quash said alias execution, which said motion was on June 26, 1929, denied and appellant Sherman is now here on appeal from the denial of this motion. By the sixth section of the Act of Congress that created this Court and defined its jurisdiction (Act March 3, 1891, c. 517; 26 Stat. 826), appellate jurisdiction was given to review "*final decision* (s) in the district courts," in certain cases; and, in the context ("final decisions" here under consideration, that grant of jurisdiction is unchanged to this day: Judicial Code, Sec. 128 (28 USCA., Sec. 225). The term, "final," as here used, has a fixed, technical meaning—it is used in contradistinction to the technical term, "interlocutory:"

> "It is hardly necessary to point out that many orders may be made which seriously affect the rights of the accused person, yet are not final in the sense of being subject to review by writ of error. One's rights may be affected by an order fixing the amount of bail, or the action of a court

> in denying a motion for a new trial, and while such orders in a sense are final, in that the defendant may have no redress from a decision against him, it could not be contended that they are final in the technical sense of the term as used in section 1014, Rev. St. As said by Chief Justice Green in State v. Wood, 23 N. J. Law, 560: 'The term "final," as applied to a judgment or judicial award, has a technical, fixed, and appropriate meaning. It denotes the essential character, not the mere consequence of the order. It is used in contradiction to "interlocutory." ' "

Fries v. U. S., 284 Fed. 825, 826 (CCA-9).

Two illustrations were given by this Court in the passage just quoted: one, of an order made *before* judgment (an order fixing the amount of bail); the other, of an order made *after* judgment (an order denying a motion for new trial). Both are instances of a lack of appellate redress. The latter is a very common instance, and has been ruled in many instances, from the earliest days of the Court, Northern Pacific Co. v. Charless, 51 Fed. 562, 579, to the present, e. g., Wulfson v. Russo-Asiatic Bank, 11 Fed. (2d) 715, 718.

> "This has been held so often that we are surprised that the denial of the motion continues to be presented as a ground for the reversal of a judgment."

Shepard v. U. S., 236 Fed. 73, 77 (CCA-9).

But the authorities are not restricted to the general doctrine that an order after judgment does not come within the meaning of the term *final decision*. In Loeber v. Schroeder, 149 U. S. 580, there was an appeal from the Court of Appeals of the State of Maryland from an order of that court denying a motion to quash

a writ of feiri facias on the ground, among others, that the decree on which the writ of feiri facias had issued was void. The court in dismissing the appeal for want of jurisdiction said:

> "It is well settled that a writ of error will not lie except to review a final judgment of decree of the highest court of the state, and that it will not lie to an order overruling a motion to quash an execution, because a decision upon the rule or motion is not such a *final judgment or decree in any suit,* as is contemplated by the judiciary acts of the general government. *Refusal to quash a writ is not a final judgment.*"

Boyle v. Zacharie, 6 Pet. 635, 657,
McCargo v. Chapman, 20 How. 555,
Early v. Rogers, 16 How. 599,
Amis v. Smith, 16 Pet. 303, 314,
Evans v. Gee, 14 Pet. 1.

Another case more recent is Noojin v. U. S., 164 Fed. 692 (CCA-5) where an appeal from the District Court of the United States from an order refusing to quash an execution was dismissed on the same ground.

We therefore submit that the appeal in this case should be dismissed.

But even though it be held that this court has appellate jurisdiction, the order of the court below must be affirmed because:

II. THE DEFAULT JUDGMENT UPON WHICH THE EXECUTION ISSUED WAS A VALID JUDGMENT AGAINST APPELLANT WILLIAM A. SHERMAN.

1. Appellant contends that the court below did not obtain jurisdiction of the person of defendant William

A. Sherman for the reason that the summons in the action, as appears by the return of the United States Marshal, was not served on William A. Sherman individually but upon James Byrne, Junior, Secretary of the Board of State Harbor Commissioners. The argument is that there being no personal service that no personal judgment could be given by the court against said defendant and that the judgment entered against him was therefore null and void and the execution issued upon the judgment should have been quashed.

The supplement to the record has brought up a motion (styled "Notice of Motion to Dismiss") (Trans. pp. 43-47) filed in the case by W. T. Plunkett as "Attorney for Defendants William A. Sherman, M. F. Cochrane and J. B. Sanford, constituting the Board of State Harbor Commissioners of the State of California, operating the State Belt Railroad."

It will be observed that the appearance was made as attorney for the identical defendants named in the caption of the complaint and named in the judgment of the court in the action. Moreover, the notice of motion to dismiss, although it states that the attorney "having appeared specially for the purpose of objecting to the jurisdiction of the court" will move to dismiss, etc., goes on to enumerate the grounds upon which the motion will be made. Among these grounds are the following:

> "III. That said Court has no jurisdiction of the matters involved in this and each and every one of the causes of action in the said Complaint contained, in that each of said actions is between the United States of America and the State of Cali-

fornia, and that the proper place of trial is the Supreme Court of the United States.

"V. That said Complaint is without sufficient facts to constitute a cause of action.

"VI. That WILLIAM A. SHERMAN, M. F. COCHRANE and J. B. SANFORD, as and constituting the Board of State Harbor Commissioners of the State of California, collectively as individuals, or as said Board, or separately as individuals, are not amenable, while acting as such Board of State Harbor Commissioners and representing the People of the State of California, and while carrying out the laws of the State of California—to any jurisdiction other than the Supreme Court of the United States, or any laws other than those of the State of California, and because of the foregoing and other reasons this action is violative of the first ten Amendments to the Constitution of the United States.

"VIII. That it does not appear, nor can it be ascertained, from the Complaint on file herein, how or in what manner, or at what times the defendants herein were operating said Belt Railroad as 'common carriers engaged in interstate commerce by railroad in the State of California.'

"IX. * * * Said motion will be made upon the grounds hereinbefore set forth."

It thus appears that the appearance although denominated a special appearance set up as grounds for the dismissal of the motion, first, that the court had no jurisdiction of the subject matter of the action; second, that the complaint was without sufficient facts to constitute a cause of action (a general demurrer); third, that the defendants are referred to individually (see paragraph VI, where the language "collectively as individuals * * * or separately as individuals" is used); and fourth (paragraph VIII), that the com-

plaint is uncertain in certain respects (special demurrer).

No rule is better established than that where a party wishes to appear specially for the purpose of objecting to jurisdiction or for quashing summons he must keep out of court for all other purposes.

In Security Loan and Trust Company of Southern California v. Boston and South Riverside Fruit Company, etc., 126 Cal. 418, there was a motion by corporation defendant to vacate a judgment rendered after publication of summons against it upon the ground that the affidavit of publication was insufficient, and which stated also as ground of the motion that the complaint did not state facts sufficient to constitute cause of action against the corporation. Although counsel in making the motion stated that it was "appearing specially for the purpose of making the motions hereinafter mentioned and not otherwise", the court held that it made a general appearance and waived all objection to the judgment for want of jurisdiction of its person. In making its decision the court quoted with approval the following language from Vol. 20, Encyclopedia of Pleading and Practice, Sec. 625, as follows:

> "The principle to be extracted from the decisions on the subject as to when a special appearance is converted into a general one, is that where the defendant appears and asks some relief which can only be granted on the hypothesis that the court has jurisdiction of the cause and person, it is a submission to the jurisdiction of the court as completely as if he had been regularly served with process, whether such an appearance by its terms be limited to a special appearance or not."

Having made this notice of motion a part of the record appellant cannot now contend that an appearance, whatever its character may be, was not actually made in the case, no matter what the judgment roll may contain.

While it is true that Section 1014, California Code of Civil Procedure, defines appearance as follows,

> "a defendant appears in an action when he answers, demurs or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him."

We contend that the record in this case shows conclusively that the so-called motion to dismiss was nothing more or less than a general and special demurrer and therefore complies fully with the provisions of Section 1014.

On this point we have the authority of Davenport v. Superior Court, 183 Cal. 506, 511 (1920):

> "An act of a defendant by which he intentionally submits himself to the jurisdiction of the court in that action for the purpose of *obtaining any ruling or order of the court* going to the merits of the case, as, for example, a motion to *strike out part* of the complaint, or the making of stipulations as in the cases above mentioned, which may reasonably be construed to imply that the court has, in that action, acquired jurisdiction of the person of the defendant will be *equivalent to an appearance,* although *not strictly in accordance with the terms of Sec.* 1014."

As to the conclusiveness of the judgment roll as showing whether or not an appearance has been made by a party, we have the holding in Brown v. Cald-

well, 13 Cal. App. 29, 30. In this case there was no summons issued and the judgment roll did not show any answer, demurrer or other appearance filed on defendant's part, but the judgment recited that the defendant appeared by W. and B. as attorneys for himself and his co-defendant Caldwell. The court held that there was a general appearance in this case and in giving its decision said:

> "Failure to serve Tungate with a summons and the absence of an answer, demurrer or other appearance on his part, all of which appears from the judgment roll, is not inconsistent with the fact recited in the judgment that he did appear in one of the other modes authorized by law, evidence of which under the statute constitutes no part of the judgment roll."

It thus appears that the contents of the judgment roll is not the sole test of whether or not an appearance has been made and that the judgment itself may be looked to for evidence of whether or not an appearance has been made according to the definition of the term "appearance" in Section 1014.

In the instant case the judgment on default entered on June 28, 1927 (Trans. pp. 9 and 10) contains the following recital: "Having failed to plead, answer or demur to the complaint herein *after the denial of defendants' motion to dismiss the complaint*". While the judgment does not directly state that the defendants filed a motion to dismiss it does so state inferentially, and having the record of the filing of such motion to dismiss now before the court this case comes directly within the principle of Brown v. Caldwell, supra, and it must be held that defendant William A.

Sherman, did appear in the action if the motion to dismiss in fact constituted a demurrer by that defendant.

It may be, and probably will be, argued by appellant that the motion to dismiss was not made by William A. Sherman as an individual but by the State Board of Harbor Commissioners as a board. A careful reading of the whole motion, however, discloses that the different parts of the motion, notably paragraph VI, where reference is made to the three defendants "collectively as individuals" or "separately as individuals" and paragraph VIII where they are referred to as "defendants" and in the signature where the attorney signs for all three defendants "constituting the Board of State Harbor Commissioners of the State of California operating the State Belt Railroad" show clearly that they did appear as individuals.

William A. Sherman, having made a general appearance, it must be held therefore that the court had jurisdiction of the person of William A. Sherman, that the judgment of the court was valid and that the refusal of the lower court to quash the execution was in every way proper.

III. THE JUDGMENT WAS AGAINST DEFENDANTS IN THEIR INDIVIDUAL CAPACITIES, AND EXECUTION WAS PROPERLY LEVIED ON THE INDIVIDUAL PROPERTY OF APPELLANT WILLIAM A. SHERMAN.

1. The appellant makes an effort to show that the action was brought and judgment given in this case against the State Board of Harbor Commissioners as an entity, and not against appellant Sherman, personally.

He states that the question as to whether the action was so brought and the judgment so given was not involved in McCallum v. United States, 298 Fed. 373. This position can not be maintained. The reverse is the fact. The caption of the complaint, the wording thereof and the wording of the judgment in that case were precisely the same as in the instant case, yet the decision in that case on writ of error in this court was:

> "This is not a case in which the members of the board were acting within the power and duty vested in them by law, or in pursuance of authorization from the state. It *is an action in tort* to recover penalties for wrongful acts committed in violation of a law of the United States, not by the state but by *individuals acting as its servants.*" (italics ours.)

Could any language be plainer than this? Is it susceptible of any meaning other than that the action was brought against the individual members of the board and that judgment was against them individually?

The same point was involved in Tilden vs. United States, 21 Fed. (2d) 967. In that case the caption of the complaint was similar to the caption in the instant case, and the wording of the judgment was the same with the single exception that the word "comprising" was used instead of the word "constituting". In his brief in that case, plaintiffs in error, on pages 8-10 inclusive thereof, attempted to make the point that the defendants were not *personally liable in tort.*

After a full consideration of the argument so made, having in mind the contention of plaintiffs in error in that case, this court said:

> "In the court below the plaintiffs in error, who constitute the Board of State Harbor Commissioners of California, were adjudged to pay a penalty of $100 for violation of Sec. 2 of the Safety Appliance Act * * *. The writ of error presents the questions which were before the court in McCallum vs. United States, 298 Fed. 373 * * *. No authorities are now presented and no reasoning is advanced which require a revocation of the conclusion which was there reached.

These two rulings are conclusive and are squarely on the point now urged upon the attention of the court. The law must therefore be considered as settled in this jurisdiction.

Appellant further argues that under recognized rules of construction, the language of the caption, of the complaint, and of the form of judgment, all show that the action was not against appellant Sherman personally. An examination of the cases cited by this court in its opinion in the case of McCallum vs. United States, supra, shows that this argument is without merit. One of these cases is Ex Parte Young, 209 U. S. 123. That was a suit in equity praying for an injunction against Edward T. Young, among others. The report of the case does not show how the defendant was named in the caption of the complaint. In the statement of the case, however, the contents of the bill are set out. Among them is an allegation that,

> "The said Edward T. Young, as Attorney General of the State of Minnesota, would * * * institute proceedings, etc."

It appears also that Edward T. Young appeared specially to object that the Court had no jurisdiction over

him, *as Attorney General* and that the state had not consented to suit against him *as Attorney General.*

A temporary restraining order was issued against Edward T. Young, *Attorney General.* The court later ordered a temporary injunction to issue against Edward T. Young, *as Attorney General.* The history of the case shows that Young instituted proceedings against a railway company, and that he was adjuged to be in contempt of court and that a petition for a writ of habeas corpus was then filed in the United States Supreme Court in behalf of *Edward T. Young as Attorney General of Minnesota.*

The rule to show cause was denied. In answer to the contention of defendant Young that he was not the defendant in the suit in which the injunction issued the court used this language:

> "It is simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional. If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution the officer in proceeding under such enactment comes into conflict with the superior authority of the Constitution and is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."

We submit that, inasmuch as the defendant in Ex Parte Young was sued as, and judgment against him was given "as Attorney General, etc.", there was much greater reason, judging from the *language* of the pleadings and the decision, for holding that the complaint

and judgment were not against him personally than there is in the present case to make the same claim for appellant William A. Sherman. Yet the court decided that the judgment was against Young as an individual.

Other cases to the same effect are:

Poindexter v. Greenhow, Treasurer, 114 U. S. 270 (where the defendant was named as Treasurer);

Reagan v. Farmers' Loan and Trust Company, 154 U. S. 362 (where defendants "acting as the Railroad Commission of Texas, etc." were enjoined).

2. The argument of appellant that the judgment could not have been rendered against him as an individual because a cause of action could not have been stated against him, is unsound.

This argument is based first on the contention that appellant William A. Sherman did not individually violate the Safety Appliance Act, and secondly that the members of the State Board of Harbor Commissioners, as individuals were not common carriers.

This argument is based on false assumptions. There was a default judgment in this case consequently there was no showing whether said appellant did or did not *individually* violate the Safety Appliance Act. The complaint alleges in all counts in direct terms that appellant committed the acts set forth in violation of the Act of Congress, known as the Safety Appliance Act. It must therefore be taken as true that appellant William A. Sherman individually committed the violation alleged.

Neither is there anything in the record to show the facts as to the manner in which the road was operated. Clearly the operator of the road, whoever he was, was the common carrier. The facts not appearing in the record, there is no basis for the assumption that appellant was not a common carrier. All that this court can take cognizance of is the allegations of the complaint. It is alleged in the complaint, in all three counts that,

> "defendant is, and was during all the times mentioned herein, a *common carrier* engaged in interstate commerce by railroad in the State of California."

No answer was filed by defendants. The allegations of the complaint must be taken to be true.

3. In any event, the contention that appellant William A. Sherman did not individually violate the Safety Appliance Act has no application, since this action is brought against him and the other defendants as a common carrier for violation of the Federal Safety Appliance Act. It has been held repeatedly that the carrier is absolutely liable for violation of the Act, independently of any degree of care that might have been exercised:

> *Chicago, Burlington & Quincy Railway v. United States,* 220 U. S. 559, 55 L. Ed. 582
>
> *United States v. Northern Pacific Railway Co.,* 287 Fed. 780.

In this case appellee maintains that the defendants, including William A. Sherman, named in the complaint were the common carrier. Appellee's argument

on this point is fully set out in appellee's brief in the case of William A. Sherman et al v. United States of America, No. 5839, pages 19 to 25 thereof, to which we particularly refer.

4. Finally appellant argues that, "Execution cannot be issued against appellant individually upon judgment rendered against him in his official capacity and execution so issued should have been quashed" and cites cases in support thereof.

We do not question that each case cited is authority for the general principle in support of which it is cited; nor do we question the soundness of the principle itself. But each and all of these cases are not in point, for the reason that they apply to situations where the defendant acted either in an official or representative capacity. As we have shown above, defendants in this case, when they committd the acts complained of were not acting in either an official or a representative capacity, but on the contrary were acting in their individual capacities. The case is analogous to that of

Kenniston v. Little, 30 N. H. 318, 64 Am. Dec. 297.

where it was held that execution could be levied against the property of defendant.

The case of *Welsbach Company vs. The State of California, et al,* 77 Cal. Dec. 373, is not in point for two reasons. First, because it was an action in assumpsit, while the instant case is for violation of a statutory duty. Second, because defendant Jordan was sued "as Secretary of State", i. e. in his official capacity.

The case of *Hartford Fire Insurance Co. vs. Jordan,* 168 Cal. 270, is also readily distinguishable. That was a case for recovery of taxes, and the ground for holding that Jordan was not individually liable was that under the laws of the State of California he was compelled to act as he did. As stated in the opinion (page 272);

> "Everything that Jordan did was in consonance with the law of the State——"

and again (bottom of same page):

> "He was not only under the mandate of our fiscal laws so to do, but he was equally bound under the strong compulsion of the penal laws——"

Further on page 274, the court gives as a reason for departing from the general rule on the subject as laid down by earlier cases:

> "This *difference in the law* is itself sufficient to demand the application of a different rule."

It is submitted that the Hartford case is very different from the instant case where instead of acting "in consonance with law", the defendants were acting without authority of law. The rule of the Hartford case should be restricted to its special facts.

Finally the language used in the judgment, viz., "William A. Sherman, M. F. Cochrane and J. B. Sanford, constituting the Board of State Harbor Commissioners, operating the State Belt Railroad" is not susceptible of the meaning which appellant seeks to give it. It is not stated that the judgment is against the three defendants "as a Board, etc.," or "as members

of the Board, etc." Without the use of such words or of equivalent terminology the judgment is against them as individuals.

C

CONCLUSION

The authorities are clear to the effect that a motion to recall and quash a writ of execution is not a final decision within the meaning of the statute authorizing appeals from the United States District Court to this court. This court has, therefore, no jurisdiction of this appeal and it should be dismissed.

If it should, however, be held that the appeal should not be dismissed, the order appealed from should be affirmed, as it clearly appears that appellant William A. Sherman made a general appearance in the cause, that the court had jurisdiction to enter a default judgment against him, that the judgment given is against said appellant in his individual capacity and that the writ of execution was properly levied upon his individual property.

Respectfully submitted,

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